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1 claims against Mr. Howcroft except claims 1 and 7.

2 Q. If you turn one exhibit earlier in your
3 binder to Q. Q is a second amended complaint that
4 was filed by the plaintiffs.

5 A. I'm afraid I'm going to make a mess here.

6 THE COURT: I'm sorry. What exhibit?

7 MR. BOLEY: Q, Your Honor.

8 THE WITNESS: I have that.

9 Q. (By Mr. Boley) And Exhibit Q is the
10 current pleading of the plaintiffs --

11 A. I'm having --

12 Q. -- subject to whatever's been dismissed;
13 is that accurate?

14 A. I'm having difficulty reading. Is this
15 2010?

16 Q. Let me -- look at the last page. The
17 certificate of service shows it was signed in
18 November of 2010.

19 A. That --

20 Q. This is the current pleading of the
21 plaintiffs in the case, correct?

22 A. Oh. Yeah. The reason that I'm confused
23 is Steve Howcroft is identified here. I think that
24 what happened is they didn't serve him with this
25 complaint until we moved -- we renewed our summary

1 judgment motion. So he, although his name does
2 appear in this, he was not part of the litigation
3 until they finally served him on the eve of the
4 summary judgment motion. So to the extent that I was
5 talking about Mr. Howcroft being reasonably added,
6 that appears to be wrong that he was included on this
7 one, but he just wasn't served.

8 MR. BOLEY: Your Honor, I offer Exhibit Q.

9 MR. SHIELDS: Your Honor, not for the
10 truth of the matter stated but as the fact that it is
11 a complaint on file, we have no objection.

12 THE COURT: Exhibit Q is received.

13 (EXHIBIT Q IS RECEIVED.)

14 Q. (By Mr. Boley) And I -- so the first
15 cause of action and the 7th cause of action,
16 according to your understanding in this complaint,
17 those are on pages 27 and 33, are what remain against
18 Mr. Howcroft, although not against your clients; is
19 that accurate?

20 A. That's my understanding. But as I say, I
21 don't represent Mr. Howcroft so I'm only relying on
22 this document.

23 Q. I understand that Mr. Howcroft was added
24 in the Toomey case, perhaps joined by service after
25 the discovery, much of the discovery had been

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1 undertaken. And that he hasn't had an opportunity to
2 undertake discovery in this case; is that fair?

3 A. That's correct. I don't recall him
4 participating in a single deposition in the case.

5 Q. And if his counsel told me he thinks that
6 case is at least a year out from going to trial,
7 would you have any reason to disagree with that?

8 MR. SHIELDS: Objection, Your Honor.
9 Speculation and hearsay.

10 Q. (By Mr. Boley) Let me ask this, do you
11 have any reason --

12 THE COURT: Well, Mr. Boley, they're not
13 asking for relief from stay to pursue dismissal of
14 the claims against Mr. Howcroft. So what's the
15 point?

16 MR. BOLEY: The point's well taken, Your
17 Honor. Let me move on.

18 Q. (By Mr. Boley) If you turn to Exhibit C,
19 that's a motion, stipulated motion for a protective
20 order in the Toomey case.

21 A. Exhibit C?

22 Q. Exhibit C.

23 A. Yes, I'm there.

24 Q. This is a motion you prepared; is that
25 correct?

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1 A. Yes.

2 MR. BOLEY: Your Honor, I offer Exhibit C.

3 MR. SHIELDS: No objection.

4 THE COURT: Exhibit C is received.

5 (EXHIBIT C IS RECEIVED.)

6 Q. (By Mr. Boley) So the protective order
7 and the order sealing proceedings and sealing
8 documents and depositions transcripts was entered at
9 your request or the request of your clients, correct?

10 A. No. This is stipulated. We prepared it.
11 But the parties agreed to -- and it's not sealing the
12 case. The case is not sealed. But under the
13 provisions of the protective order, if there are
14 confidential documents you can designate them and
15 file them under seal.

16 Q. Now, I understand --

17 THE COURT: Excuse me. I'm going to make
18 sure I understand. The pleadings in the case are not
19 sealed.

20 THE WITNESS: That's correct.

21 THE COURT: This is not like that Nu Skin
22 litigation that's been in the paper lately?

23 THE WITNESS: No. No.

24 THE COURT: Okay.

25 THE WITNESS: No.

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1 THE COURT: All right.

2 MR. HARRINGTON: Your Honor, excuse me.

3 The docket, for clarification of the Court, the
4 pleadings are private. They are not accessible to
5 the public. So as to the difference, we can't get in
6 and see the Toomey litigation pleadings.

7 THE WITNESS: That -- if that is the case,
8 that shouldn't be because the case itself is not
9 filed under seal. Although because so many documents
10 are attached to pleadings, that probably most of the
11 pleadings are filed under seal.

12 MR. HARRINGTON: Well, Your Honor, I can
13 only address you. In Exhibit 14, which is the docket
14 (inaudible) Mr. Manning --

15 THE COURT: Right.

16 MR. HARRINGTON: There was in court
17 (inaudible) that start on page 6. You will see that
18 once it's transferred, this is February 19, 2010, you
19 will see all of that as being private. Do you see
20 that? So none of this of what you've testified with
21 respect to this is available to, for example, Forge,
22 my client.

23 I've interrupted his testimony, Your
24 Honor, I apologize.

25 THE COURT: No, I appreciate the

1 clarification. Thank you.

2 Q. (By Mr. Boley) Now, I understand,
3 Mr. Manning, that at at least one time or perhaps at
4 more than one time the debtors sought the opportunity
5 to use the discovery that they had taken in the
6 Toomey case and use it in other cases; is that
7 correct?

8 A. Can you refresh my recollection? Do you
9 have a document that would assist me?

10 Q. I don't have a document. I'm asking for
11 your recollection. Your recollection is that they
12 did ask --

13 A. That is not my recollection. But I just
14 don't have a firm recollection on that point.

15 Q. Let me ask this: Do you recall opposing
16 the debtors' efforts to limit or lift the protective
17 order so they could use the documents. For example,
18 in the Kennedy -- case before Judge Kennedy.

19 A. Judge Kennedy is where the Howcroft
20 litigation is? I don't recall that. But if you can
21 show me something to refresh my recollection. My
22 recollection is just not -- it's just -- I just don't
23 have a recollection there.

24 Q. Let me ask this then: It is true that the
25 debtors under the current stipulated discovery, or

1 the stipulated protective order, haven't had and
2 don't have the right to use any of that information
3 in the case pending before Judge Kennedy.

4 A. Well, Mr. Howcroft is a party to this
5 litigation. To the extent that Mr. Howcroft is a
6 party to this litigation, he has access to that. I
7 don't know what his lawyer has done in that regard.

8 Q. Maybe I misspoke. Certainly the debtors
9 have access to the information. But this protective
10 order won't let the debtors use that information in
11 the case pending in front of Judge Kennedy; is that
12 correct?

13 A. That would be my interpretation of the
14 protective order, which is why we had to go to Judge
15 Toomey to get relief from the protective order so
16 that we could use this in the Forge litigation.

17 Q. So when you talked earlier about prejudice
18 by not being permitted access to the information that
19 are subject to the protective order, your clients and
20 the debtors both have suffered prejudice from that
21 limitation; is that correct?

22 A. Well, my understanding is that the debtors
23 don't want the other litigation to go forward so the
24 existence of the protective order actually is a
25 shield for them in the present posture. But if they

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1 wanted to use and not duplicate discovery, yes, it
2 would prejudice them because they should be able to
3 use the discovery in this case in the Forge
4 litigation as well. If -- but my understanding is
5 they --

6 Q. I'm just asking --

7 A. My understanding --

8 Q. The prejudice has been equal, right?

9 A. Say what?

10 Q. The prejudice has been equal. Both
11 parties have been prohibited from using the the
12 information.

13 A. Well, you know, that's like saying don't
14 throw me into the briar patch because that will be
15 prejudicial to me, when that's exactly what you want.
16 It appears to me that the debtors want to stop the
17 litigation against my clients and Forge. And they
18 are opposing relief from this protective order so
19 that that information cannot be used there. So if
20 they think that they're being prejudiced by the
21 existence of this protective order, then they
22 shouldn't oppose our motion to get relief from this
23 so that it can be used.

24 Q. Well --

25 A. I don't know how you can say that they're

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1 being prejudiced by having the very result they seek.

2 Q. They have to go to trial in November.

3 They don't get to use any of this information in the
4 Kennedy case. They've got to go to trial in November
5 with their hands tied behind their back.

6 A. They could stipulate, and we would
7 stipulate. We tried to get this relief from them and
8 they opposed it.

9 Q. Okay. Let me move on. I understand that
10 you personally have loaned moneys to the Traverse
11 Mountain entities; is that correct?

12 A. Me?

13 Q. Yeah.

14 A. No. No way.

15 Q. Your law firm?

16 A. No way.

17 Q. Any entity that you're affiliated with?

18 A. No way.

19 Q. Okay. Perhaps I was misinformed.

20 A. I suspect I know the source of your
21 misinformation, but...

22 Q. Now, when you testified about the amount
23 in fees that your clients were going to seek in the
24 Toomey case, it approached a half million dollars?

25 A. Yes.

1 Q. And costs of a half million to a million
2 dollars are common in complex commercial litigations
3 cases like this; is that fair?

4 A. You used the word "costs."

5 Q. Well, attorney's fees and costs.

6 A. Attorney's fees and costs.

7 Q. Half a million to a million is common in a
8 commercial litigation case pending in state court.

9 A. Well, it depends on how much is at stake.
10 My clients typically don't want to invest that much
11 if they don't have a prospect to recover or their
12 claim is for less than that. But if you have the
13 prospect of a significant recovery in complex
14 commercial litigation, you bet. Fees and costs are
15 going to be more than half a million dollars.

16 MR. BOLEY: I tender the witness, Your
17 Honor.

18 THE COURT: Mr. Shields, anything further?

19 MR. HARRINGTON: Your Honor, if I might
20 ask a few questions.

21

22 CROSS-EXAMINATION

23 BY MR. HARRINGTON:

24 Q. Mr. Manning, my client is Forge
25 Investments, Inc. who has become a party in interest

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1 in this matter of lifting the stay. Let me ask you a
2 couple questions. A great deal of testimony about
3 the Toomey case, but just some singular questions.
4 Do you know if Forge is a party to the Toomey
5 litigation?

6 A. To my knowledge, they are not.

7 Q. Well, would there anybody else that would
8 know about? You're the attorney of record on that,
9 right?

10 A. That's right. And I'm not trying to
11 evade. It's just if they've done something to try to
12 intervene there, I am not aware of it.

13 Q. No, they have not.

14 A. Okay. To my knowledge Forge is not and
15 has never been a party, nor was U.S. Bank.

16 Q. Okay. All right. Now, with respect to
17 that, has a -- was Forge party to any negotiations
18 about the protective order in the Toomey litigation?

19 A. No.

20 Q. Did Forge participate in any of the
21 discovery in the Toomey litigation?

22 A. Well, I'm not sure what the relationship
23 is between Forge and Mr. Freeman. Certainly we did
24 -- and had very extensive efforts to get discovery
25 from Mr. Freeman, who is the principal of Forge. I

1 took his deposition. We have been in extensive
2 battles trying to get him to turn over documents.

3 Q. Well, let me do a better job of asking
4 that question. Did Forge participate, Forge -- and
5 again, let's be clear with the Court. Mr. Freeman is
6 the member, the managing member of Forge. Did Forge
7 participate in any discovery in the Toomey case other
8 than your having taken Mr. Freeman's deposition?
9 Were they present at the depositions, a
10 representative?

11 A. Forge, as -- Forge was not. But that's
12 sort of like asking did Mr. Heap participate in the
13 litigation. Mr. Heap is a manager of a defendant.
14 In that case he's also a party. But Mr. Freeman, as
15 a manager of Forge, was not deposed in his capacity
16 as a manager of Forge. He was deposed as an
17 individual. He was doing things with any number of
18 other entities, trying to --

19 Q. My question is simply is this: Does Forge
20 -- all this discovery that went on here, did they
21 participate, did they have an attorney participate in
22 that discovery? And the answer is no, right?

23 A. The answer to your last question is did
24 they have an attorney participate in it? They did
25 not.

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1 Q. Okay. They weren't a party. They didn't
2 participate. Save and except for the deposition you
3 took of Mr. Freeman, Forge did not participate in any
4 of that discovery?

5 A. We received a few -- I don't know if it's
6 hundreds or if it crossed over to thousands of
7 documents from Mr. Freeman.

8 Q. They were subjects of your discovery
9 request?

10 A. That's correct.

11 Q. With a deposition and --

12 A. That's correct. That's correct.

13 Q. I'm asking if they participated in that
14 discovery as a party.

15 A. Forge?

16 Q. And the answer is no.

17 A. Forge was not a party.

18 Q. Very good.

19 A. Mr. Freeman was not a party. Forge did
20 not have an attorney participate in the litigation.
21 I am just trying to tell you --

22 Q. And they did not participate in the
23 formulation of the protective order in the Toomey
24 case --

25 A. That's correct.

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1 Q. -- did they?

2 A. That's what I --

3 Q. They haven't been given a copy of the
4 protective order in the Toomey case.

5 A. I believe that a copy was attached to one
6 of the filings.

7 Q. Okay.

8 A. And I know that Mr. Freeman has a copy of
9 it because in connection with his deposition I made
10 it available.

11 Q. And so what your position is, you want to
12 pick up all of this discovery (inaudible) in the
13 Toomey case in which Forge did not participate as a
14 party. And you say you want to use it in the Forge
15 litigation in Fourth District? Is that your
16 position?

17 THE COURT: That's what he wants to ask of
18 Judge Toomey.

19 THE WITNESS: I want to ask Judge Toomey
20 to --

21 MR. HARRINGTON: To do.

22 THE WITNESS: -- allow us to do that. And
23 I assume that Forge, to the extent that they
24 cross-examine or have objection to documents or want
25 to redo that -- those -- that discovery, they will be

1 advantaged because they will be able to see what is
2 already there. And they won't have to start from
3 scratch.

4 Q. (By Mr. Harrington) Let me ask in just
5 some, again, simple questions. This is you and your
6 law firm, Manning Curtis. I'm trying to figure out
7 who you represent. Do you represent any party
8 involved in the Forge litigation?

9 A. No.

10 Q. Okay. Do you -- are you involved in the
11 remaining claims 1 and 7 with Mr. Howcroft? Are you
12 involved in that litigation?

13 A. Only that it is taking place in a
14 litigation where we will be asserting counterclaims
15 and cross-claims. I do not represent Mr. Howcroft
16 and never have.

17 Q. Okay. Now, there's other Traverse
18 Mountain litigation that you represent parties at, do
19 you not?

20 A. Yes.

21 Q. Okay. That is the NCP litigation,
22 National Capital Partners litigation?

23 A. The Traverse Mountain litigation against
24 NCP was settled.

25 Q. Okay. When was that settled?

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1 A. Shortly after it was filed.

2 Q. Okay. But there have been other ones
3 involving Mr. Heap and others involved that you
4 concurrently are involved with?

5 A. Not involving Mr. Heap, no.

6 Q. You're not?

7 A. No.

8 Q. You're not involved. You're involved in
9 no lawsuits in which Pia Anderson is representing
10 NCP?

11 A. I am involved in defending other clients
12 in cases in which Pia Anderson is representing
13 representing NCP.

14 Q. Okay. And that involve --

15 A. They do not involve Traverse Mountain
16 company.

17 Q. They don't involve Traverse?

18 A. No.

19 Q. All right. Now, your position here is
20 that these documents, delineated on page 6 of Exhibit
21 Number 14, those would all -- or should have been
22 made available to Forge.

23 A. I'm sorry?

24 Q. On page 6, Exhibit 14 they are designated
25 as private. Do you see those? It continues to the

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1 very end.

2 A. I see some designated as private.

3 Q. Well, those designated as private, are
4 those available now to Forge?

5 A. I don't know why some of these things are
6 designated as private. I have my own pleading file
7 here, and I can tell you whether we filed things
8 under seal.

9 Q. Well, let me ask you this question: Would
10 you make your litigation -- excuse me, your pleadings
11 file available to us?

12 A. Sure. Except to the extent you would have
13 to -- we would have to have relief from the
14 protective order. But all of the pleadings -- most
15 of the pleadings are filed under seal because of the
16 -- they're confidential documents attached to it.

17 Q. And that's why I'm troubled here today.
18 You freely testify as to the content of these various
19 pleadings, but they're not available for us to enable
20 us to ask you questions.

21 MR. SHIELDS: Objection, Your Honor.
22 That's argument not a question.

23 THE WITNESS: I think --

24 THE COURT: I'm not sure -- what documents
25 are you talking about, Mr. Harrington?

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1 THE WITNESS: What document do you want
2 to --

3 MR. HARRINGTON: All those --

4 THE WITNESS: I --

5 MR. HARRINGTON: All those marked as
6 private.

7 THE COURT: But help --

8 THE WITNESS: I will --

9 THE COURT: Mr. Manning --

10 THE WITNESS: I will ask --

11 MR. HARRINGTON: Your Honor.

12 THE COURT: Mr. Manning, just hold on a
13 second.

14 What's the focus of your questions?

15 MR. HARRINGTON: The focus, Your Honor, is
16 not having been made privy to these private pleadings
17 with respect to what is transpiring with the
18 protective order. In other words, we quite frankly
19 are -- we are not sure that they may not have some
20 impact on the lifting of the stay with the protective
21 order. We don't have a dog in the fight as to what
22 happens with respect to the debtor and that. But it
23 does have -- it does bear on us that they have
24 explicitly wanted to bring it into our Fourth
25 District. We'd like to know what's going on with

1 that. And not having had it, we think that
2 Mr. Manning's testimony here is a characterization
3 that we have been denied an opportunity to
4 cross-examine.

5 THE COURT: All right. I missed the last
6 point. I'm sorry. Denied --

7 MR. HARRINGTON: When we can't see what is
8 going on with the protective order and what has
9 transpired in these documents, we don't know what the
10 implications of lifting the stay for the debtor is
11 going to be on us. All we know is they want to pick
12 up a bunch of discovery that we haven't participated
13 in and shove it into our case. We want to know what
14 that protective order is and what the implications
15 are --

16 THE COURT: Right.

17 MR. HARRINGTON: -- for both ourselves and
18 the debtor.

19 THE COURT: Yeah. You don't know what's
20 in there. I don't know what's in there. And that's
21 a question for you to raise either by intervening
22 with Judge Toomey or by raising it in the actions
23 before Judge Laycock and Judge Kennedy.

24 MR. HARRINGTON: Very good, sir. No
25 further questions.

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1 THE WITNESS: The protective order is --

2 THE COURT: Mr. Manning, there's no
3 question pending.

4 MR. HARRINGTON: There's no question.

5 THE WITNESS: Sorry.

6 THE COURT: Are you okay?

7 MR. SHIELDS: I have no further questions,
8 Your Honor.

9 THE COURT: All right.

10 THE WITNESS: I should have to do that
11 myself since I accomplished it.

12 THE COURT: All right. Mr. Manning, you
13 can step down.

14 Any other witnesses, Mr. Shields?

15 MR. SHIELDS: Yes, Your Honor. We call
16 our next witness, Mr. Bryan Scott.

17 UNIDENTIFIED SPEAKER: (Inaudible.)

18 MR. SHIELDS: Yes. Can we excuse
19 Mr. Manning?

20 THE COURT: Any objection?

21 MR. BOLEY: No, Your Honor.

22 THE COURT: All right. Thank you,
23 Mr. Manning. You're excused.

24 THE BAILIFF: Please come forward to this
25 mic and raise your right hand.

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Bryan Scott,

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called as a witness, being first sworn,

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was examined and testified as follows:

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THE BAILIFF: Please take the witness
stand and state your full name for the record.

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THE WITNESS: Bryan Michael Scott.

9

10

DIRECT EXAMINATION

11

BY MR. SHIELDS:

12

Q. Mr. Scott, would you give the Court some
brief background about your experience as an
attorney?

13

14

15

A. Yeah. I went to -- I graduated from law
school at UNLV, William S. Boyd School of Law in
2001. After that I went to the University of
Washington and received an LLM in tax. Following my
stint at the University of Washington, I went back to
Las Vegas. I practiced -- I'm licensed to practice
in both Nevada and Utah. I practiced in Las Vegas at
the firm called Beckley Singleton. And after about a
year there I move back to Utah, I practiced at Snow
Christensen & Martineau for roughly eight years. And
a couple of years ago one of my partners and I, Stan

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1 Preston, left Snow Christensen and started our own
2 firm, Preston & Scott.

3 Q. Okay. And what's your experience with the
4 Traverse Mountain parties? How long have you been
5 representing them?

6 A. We've been representing them for -- I
7 believe a little over a year now. We got involved
8 with those parties with the foreclosure actions with
9 U.S. Bank.

10 Q. So you've been representing the TM parties
11 in what we call the Forge litigation that's filed in
12 Utah County?

13 A. That's correct.

14 Q. Briefly describe for the Court the
15 difference between what I call the Judge Laycock
16 action and the Judge Taylor action.

17 A. The Judge Laycock action -- excuse me, is
18 judge a nonjudicial foreclosure, deficiency judgment
19 on some notes that were held by U.S. Bank and that
20 were transferred to one of their affiliates, SA Group
21 Properties, and then were later purchased by Forge.
22 The Judge Taylor litigation is a judicial foreclosure
23 action, again involving notes between the TM parties
24 and those notes for judicial foreclosure on those
25 notes.

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1 Q. And the property securing those notes is
2 located in Utah County?

3 A. That's right. It's referred to as the
4 Traverse Mountain project.

5 Q. Okay. And have you been counsel for the
6 TM parties since the beginning of those cases?

7 A. Yes.

8 Q. Okay. And you worked closely with
9 Mr. Stan Preston on this case, right?

10 A. Correct.

11 Q. And we had designated Stan as a witness,
12 but he's in Hawaii today; is that correct?

13 A. That's right. I'd much rather swap places
14 with Mr. Preston.

15 Q. So just briefly tell the Court who's the
16 plaintiff -- U.S. Bank is the plaintiff -- was the
17 initial plaintiff in both those actions, correct?

18 A. Yeah. I mean, those cases have taken --
19 you know, originally the claims were just the simple
20 foreclosure claims. The position of it now since
21 Forge has come in has made a different scenario. But
22 U.S. Bank was the original plaintiffs in the Judge
23 Taylor litigation. In the Judge Laycock litigation
24 they had transferred those notes to SA Group
25 Properties. In about May of this year we were

1 informed that the notes had been sold from U.S. Bank
2 to a company called Forge Investments Utah, LLC.
3 They filed a motion on May 15th, I believe it was, to
4 be substituted as the plaintiff in interest in both
5 of those cases.

6 Q. So just a month before the bankruptcy, a
7 month and a few days.

8 A. Correct. Correct.

9 Q. Now, has the TM parties filed a motion to
10 amend their answer to assert counterclaims,
11 cross-claims and third party complaints?

12 A. We did. Approximately -- you know what,
13 when we got the notice that the notes had been sold
14 and we got the information that they had been sold to
15 Forge Investments, we found out that Mr. Freeman, who
16 had been in the Toomey litigation as far as being
17 deposed and giving documents and that case, was the
18 manager of Forge Investments. And we understood, as
19 the manager of Forge Investments, that he had been
20 involved with Mr. Christensen. And that he
21 considered the Christensen family family to him.

22 And so as we looked at the claims in the
23 Toomey litigation, we could see that there was
24 definitely something that we felt a long pattern of
25 work between the Christensens and Mr. Freeman to

1 purchase these notes that are the subject of the
2 foreclosure actions. To take back the companies and
3 to foreclose on those loans and then to also go
4 against the personal guarantors of those loans, which
5 were our client.

6 So once we found out on May 15th when
7 Forge came in and filed their motion to be inserted
8 as the plaintiff -- I think it was May 24th, I want
9 to say, that we filed a motion ourselves to file an
10 amended answer to file counterclaims, cross-claims
11 and third-party complaint.

12 Q. And did Forge oppose that motion?

13 A. Forge did oppose that motion.

14 Q. And did they also allege that the motion
15 lacked specificity?

16 A. Yeah. That was really their main
17 argument. They said, look, you've made these RICO
18 claims. You've made various claims, and we don't
19 have the -- you don't have -- you haven't pled them
20 with enough specificity and they're futile and they
21 should be dismissed.

22 Of course our argument to that was, well,
23 you know, we've talked about having a protective
24 order in this case, a stipulated protective order.
25 And one of the things that we had said about that

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1 protective order is, look, we need to be able to use
2 the information from this Third District case --

3 Q. The Toomey case?

4 A. The Toomey case. And these cases as well.
5 And so we had a provision in that stipulated
6 protective order that that would be the case. Forge
7 is -- Forge would not agree to that. So we had to
8 file a motion for a protective order in that case
9 where we -- where we asserted that that needed to be
10 the case, and they've opposed that motion.

11 Q. Has that been heard by the judge yet?

12 A. It has not.

13 Q. So is it your expectation that the Forge
14 will be heard in the Forge litigation if Judge Toomey
15 amends the protective order?

16 A. Say that again. Sorry, I didn't --

17 MR. BOLEY: That calls for speculation.

18 THE COURT: I didn't understand the
19 question. So let's back up and try it again.

20 MR. SHIELDS: I'm sorry. That was a poor
21 yes. Let me restate it.

22 THE COURT: All right.

23 Q. (By Mr. Shields) Do you expect that if
24 Judge Toomey modifies the protective order, if this
25 bankruptcy court grants relief from stay and if the

1 TM parties are able to the proceed with the motion to
2 amend protective order, which Mr. Manning talked
3 about -- and you were here during Mr. Manning's
4 testimony, correct?

5 A. Yes.

6 Q. Okay. If Judge Toomey grants that motion
7 and the protective order is modified such that TM
8 companies can use those documents in the Forge
9 litigation in the Fourth District court, do you
10 believe -- will Forge have an opportunity to oppose
11 the use of those documents?

12 A. Sure. They'll have the opportunity. As
13 I've said, they've already filed an opposition to the
14 motion that we filed for a protective order.

15 Q. So the characterization you're just going
16 to dump all those documents from the Toomey case
17 there is not accurate because that'll be subject to
18 Judge Taylor's review and response to your motion for
19 protective order there?

20 A. That's correct.

21 Q. Now, would you look at Exhibit 6. This is
22 in the numbered exhibits. That's already been
23 admitted. So you just briefly describe to the Court
24 -- is that your work product?

25 A. It is, yes.

1 Q. Will you tell the Court briefly what that
2 is? How long ago did you prepare that and why?

3 A. This has been prepared just recently. We
4 filed an original counterclaim, cross-claim and
5 third-party complaint and filed a motion to also
6 amend the scheduling order to allow us to conduct
7 discovery based on all of the claims that were
8 asserted. This has just been recently filed as it's
9 been discussed in this hearing earlier that this
10 encompasses the claims from the pending lawsuits.
11 The claims from -- they're all relevant, and they're
12 all tied to the same -- really the same type and sets
13 of facts.

14 So this would have claims against the
15 Christensen parties from the Toomey litigation. It
16 also brought in claims against U.S. Bank as well as
17 the original claims that we had filed and put in
18 front of Judge Taylor and Judge Laycock in the
19 original -- our original proposed amended
20 counterclaims.

21 Q. And have you agreed -- or has your client
22 instructed you to agree to not oppose Forge's motion
23 to consolidate?

24 A. Yes. We never opposed the -- Forge filed
25 a motion to consolidate. And again, what got tricky

1 here with this was the bankruptcy. You know, we've
2 never said that the bankruptcy stay applies to us.
3 We've never taken a position with that. What we have
4 said is, look, we received these notices, we received
5 one from the VS Fox Ridge entity and one from the
6 individual debtors, that both claim that the
7 bankruptcy stayed the entire proceedings as to
8 debtors and codebtors.

9 So we simply just said, look, we don't
10 know if it applies or not but we filed a notice with
11 both Judge Laycock and Judge Taylor saying we don't
12 know if it applies or not but we need to get
13 clarification on this and we don't want to be filing
14 things and responding to motions and documents
15 when -- you know, we don't want to be sanctioned, we
16 don't want to violate the stay. And so we simply
17 said we need further instruction from the bankruptcy
18 court on whether or not this applies to all the
19 parties.

20 Q. But you will agree or not oppose the
21 pending motion to consolidate if this Court grants a
22 relief from stay to proceed with the Forge
23 litigation?

24 A. That's correct.

25 Q. And is the goal to get all these claims in

1 one action?

2 A. Yeah. I mean, we think that'll be the
3 best judicially, to use the judicial resources, the
4 most efficient. There's no need -- again, that's why
5 we took this amended protective order approach,
6 there's no need to rehash and redo these hundreds and
7 thousands of dollars worth of discovery that's
8 already been done.

9 Q. And just briefly, not in detail, I know
10 that's a long counterclaim, third-party complaint and
11 cross-claim. But just briefly describe for the Court
12 what the nature of the claims asserted in that
13 pleading is.

14 MR. BERRY: Objection, Your Honor. This
15 Exhibit Number 6 that he's now being asked to talk
16 about is something that appeared for the first time
17 attached to a late filed response. Late filed under
18 Rule 9006-1. Late filed as in 6:43 p.m. on October
19 the 9th. It's something that, A, shouldn't really be
20 discussed, was late filed, and now to have him
21 explain some concept that we've had less than 30
22 hours to even see, is just preposterous. We would
23 ask the Court to deny this line of questions.

24 THE COURT: Overruled. Thank you.

25 THE WITNESS: The claims are basic breach

1 of contract claims against Steve Christensen and
2 McKay Christensen, RICO claims against the
3 Christensens and against Atlas Development, which is
4 an entity that's also managed by Mr. Freeman and
5 Forge Investments. And Mr. Freeman conspiracy to
6 commit RICO. There's intentional interference with
7 contract against Atlas and Forge and Mr. Freeman and
8 against McKay Christensen, Steve Christensen, breach
9 of fiduciary duties.

10 One of the things that really -- that
11 sparked this counterclaim was an individual by the
12 name of Brent Tanner came forward and assigned a
13 declaration --

14 MR. BOLEY: I'm going to object. I know
15 this is going to call for hearsay or this testimony
16 is going to be pure hearsay. So before we talk about
17 what Brent Tanner said --

18 THE COURT: There's no question pending.
19 He's just testifying.

20 MR. BOLEY: Well, I'm objecting before he,
21 in a narrative, gives a bunch of hearsay testimony
22 from Mr. Tanner who's not here.

23 THE COURT: All right. Well, Mr. Scott
24 knows what hearsay is. So I'll admonish you ahead of
25 time, let's keep it to what you know.

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1 Could you ask a pending question?

2 MR. SHIELDS: Me?

3 THE COURT: Yeah.

4 MR. SHIELDS: Yeah. Okay.

5 THE COURT: Because I kind of lost track
6 of where we're going, so.

7 MR. SHIELDS: Yeah.

8 Q. (By Mr. Shields) So the counterclaim --
9 the proposed third-party complaint, counterclaim and
10 cross-claim that you -- that's a document you've
11 prepared?

12 A. That's a document that I prepared, yes.

13 Q. And it's not been filed yet because we
14 don't have relief from stay?

15 A. That's right.

16 Q. And the purpose was to provide the parties
17 who are opposing this motion for stay of relief
18 notice of the nature and type of claims that the TM
19 companies expect to assert in the Forge litigation if
20 the Court grants stay; is that correct?

21 A. That's correct. I mean, we've already
22 asserted most of them, like I say. So there are some
23 new claims against U.S. Bank. And we've added claims
24 against the Christensens that were coming over from
25 the Toomey litigation. So like I say, it's all in

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1 one place. It's all to be heard in one spot.

2 Q. You're familiar with Rule 11?

3 A. I am.

4 Q. And you're willing to sign this complaint
5 if the Court allows relief from stay under that rule?

6 A. Absolutely.

7 Q. Now, would you look at Exhibit A?

8 THE COURT: Mr. Shields, what I want to
9 hear from Mr. Scott is what claims do you propose to
10 assert in this document, this pleading, that haven't
11 been raised prior to the petition date against Mr.
12 and Mrs. Christensen and VS Fox Ridge?

13 THE WITNESS: Those would be the claims,
14 Your Honor, for the breach of contract under the
15 breach of the settlement agreement, which were claims
16 that were being brought in the Toomey litigation, as
17 well as the intentional interference. Those three or
18 four different claims against the specific debtors.
19 Those were not -- those claims were not put in. And
20 the reason that's important, Your Honor, is, look --

21 THE COURT: But those are issues that
22 arose during the discovery in the Toomey matter?

23 THE WITNESS: That's correct.

24 THE COURT: Okay.

25 MR. SHIELDS: Is that satisfactory?

1 THE COURT: That's helpful to me. Thank
2 you.

3 MR. SHIELDS: Okay.

4 Q. (By Mr. Shields) Would you look briefly
5 at Exhibit 8 that's already been admitted. Just
6 confirming that Stan Preston is your partner,
7 correct?

8 A. Yes.

9 Q. And have you seen this document before?

10 A. I have, yes.

11 Q. This is the one e-mail exchange between
12 Lavar that debtors' counsel eventually stipulated
13 could be admitted.

14 But did you have matters in the Forge
15 litigation that you wanted to proceed with but
16 because of the allegations made by the debtors'
17 attorney, Mr. Lavar Christensen, you chose not to
18 proceed?

19 A. Yeah. I mean, there were several. We had
20 scheduled depositions for Mr. Lavar -- or not --
21 sorry. Not Lavar, but Mr. Steve Christensen and
22 McKay Christensen. The day before we were to depose
23 Steve Christensen, Mr. Boley called and talked with
24 Stan Preston and said that they -- you know, he
25 wasn't available. They wouldn't be able to produce.

1 They didn't feel that -- they felt that the
2 bankruptcy stay precluded the deposition against --
3 that we wanted to take with Mr. Christensen.

4 And then we also, the following day, got a
5 call from Lavar Christensen saying that he felt that
6 the bankruptcy -- because the parties were so
7 intertwined, it also would be a stay and they
8 wouldn't produce McKay Christensen. He did say that
9 they would produce him, but he said what he would be
10 instructed to do if we were to get into any questions
11 regarding Mr. Freeman or Mr. Forge -- or the entity
12 Forge, he would instruct his client not to answer
13 those questions.

14 And he also told us that he would not be
15 producing any of the documents in the subpoena duces
16 tecum that we had served on McKay Christensen that we
17 were seeking that were relevant, again, to these
18 Forge claims and the claims we were making.

19 Q. Okay. Just to draw the Court's attention,
20 would you turn to page 2 of Exhibit 8. And this is
21 the e-mail from Lavar to Stan dated June 26, 2012.
22 This is post-petition but before that that deposition
23 was scheduled, correct?

24 A. That's correct.

25 Q. And look at the sentence, one, two, three,

1 four, five lines down. The sentence that starts with
2 "the issues." Would you please read that into the
3 record?

4 A. "The issues and defenses are so integrated
5 and Stephen Christensen has been in such a superior
6 position to know the facts and issued involved in
7 this case, that McKay's role is extremely limited and
8 directly affected by the Chapter 11 bankruptcy
9 filing."

10 Q. Was it partially based on this e-mail that
11 you decided not to proceed with the deposition of
12 McKay?

13 A. Yeah. This e-mail, then there was a
14 telephone conference between Stan, myself and Lavar
15 where we discussed these things further. And so that
16 was -- I -- Stan and I drafted this e-mail back to
17 Lavar saying, look, it's pointless to hold this
18 deposition. If you're going to instruct your client
19 not to answer questions about Forge and about the
20 various claims that -- the amended claims that we're
21 trying to make, then it will be -- you know, we don't
22 want to waste your time and our time and our clients
23 money by going ahead with this deposition.

24 Q. And that's when bankruptcy counsel was
25 retained to get relief from the stay, to monitor the

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1 bankruptcy case; is that correct?

2 A. That's correct.

3 Q. Would you turn to Exhibit 9. Identify
4 that for the Court.

5 A. Yes. This is the -- this looks to be the
6 minute entry that was entered by Judge Taylor once we
7 had filed the notices of the bankruptcies and they
8 had been made. This was the judge's ruling in
9 regards to whether or not they applied and how we
10 would proceed with the litigation.

11 Q. And was this in response to briefing that
12 you filed with Judge Taylor?

13 A. Yes.

14 Q. What position do you take in that
15 briefing? "You" meaning the TM companies.

16 A. Yeah. Again, like I said, we didn't take
17 a position of whether it applied or not. We just
18 said --

19 MR. BOLEY: Your Honor, the briefing is
20 part of the debtors' exhibits. And perhaps that's a
21 better way of letting the Court know what was told to
22 Judge Taylor is to just offer those as exhibits.

23 THE COURT: Which exhibits, I'm sorry?

24 MR. BOLEY: Exhibits H through N, which
25 are pleadings filed by the Preston Scott firm and the

1 two judge's rulings.

2 MR. SHIELDS: And we don't oppose those,
3 Your Honor. I think they've been entered into
4 evidence. I think this witness is able to testify
5 about his knowledge of what they pled and what they
6 argued.

7 MR. BOLEY: They say what they say.

8 THE COURT: Well, but they're sitting
9 there like a dead mouse unless somebody tells me
10 about them or draws my attention to relevant
11 information in the documents. So I think it would be
12 helpful for Mr. Scott to tell me where the nuggets
13 are here, at least at far as their position is.
14 Okay?

15 MR. SHIELDS: Sure, Your Honor.

16 THE COURT: All right. So Exhibits H
17 through N are received without objection.

18 (EXHIBITS H, I, J, K, L, M AND N ARE
19 RECEIVED.)

20 THE WITNESS: Do we want to look at those
21 -- do you want to look at those?

22 Q. (By Mr. Shields) No. Just off title --
23 if you want him -- that helps you answer the
24 question. But I'm not saying you have to go read
25 from those pleadings.

1 A. Yeah. Again, we laid down the facts as to
2 what's happened as far as -- the key issue for us is,
3 look, we can't prosecute our claims, we can't defend
4 against our claims unless we have access to the
5 debtors, unless we have access to these documents.
6 And we laid out those facts.

7 Q. By documents you mean the Toomey
8 litigation?

9 A. Yeah. I'm sorry. The Toomey litigation.
10 And so we laid out those facts and then simply said,
11 look, we've received notices that these proceedings
12 are stayed and we are not willing to -- we're not
13 willing to file anything or to answer anything until
14 we get instruction from the bankruptcy court or
15 whether or not we even can. I mean, and that's --
16 that was the purpose of those notices, to get
17 instruction.

18 And I didn't go down to the -- there was a
19 hearing in front of Judge Laycock where I believe
20 this was argued. And she said, I agree. And she
21 held everything that was pending in front of her,
22 pending, you know, us briefing the issue and getting
23 this in front of the Court to get a determination on
24 the scope of the stay and whether or not it applied.

25 Q. And wasn't one of the other issues who had

1 authority to determine the scope of the stay, whether
2 that's the state court or the bankruptcy court?

3 A. That's correct.

4 Q. And ultimately both state court judges
5 said that should be a bankruptcy court?

6 A. That's right.

7 Q. Would you look on page 2 of Exhibit 9 and
8 just read that last sentence of the first full
9 paragraph starting with the "Potential debtor"?

10 A. "Potential debtor or claimant to an
11 interest in the property is by any measure a person
12 needed for just adjudication of the rights of all
13 parties. In other words, indispensable within the
14 scope of Rule 19, URCP."

15 Q. And then the next sentence as well.

16 A. "A far more sensible approach is to defer
17 and allow the questions of the scope of the stay to
18 be raised and determined in the bankruptcy court."

19 Q. Thank you. Now, would you turn to
20 Exhibit 10, which is the next exhibit. Identify that
21 for the Court.

22 A. Exhibit 10 is Judge Laycock, her ruling
23 with regards to the stay. She says that she's seen
24 Judge Taylor's and she accepts what Judge Taylor
25 said. She also says she believes the debtors are

1 indispensable parties. And again says that she'll
2 wait to hear from the bankruptcy court.

3 Q. And on page 2, the first full paragraph
4 starts with "This court agrees." Go down to the
5 middle of that paragraph, the sentence in the fourth
6 line that starts "This court also agrees." Please
7 read that to the end of the paragraph.

8 A. "This court also agrees with Judge
9 Taylor's assessment of the indispensability of all
10 claimants and to the real property at issue in this
11 case. Attempting needed discovery without all
12 parties involved would only create," -- it says
13 created but it should be -- "would only create
14 confusion and delay in this state court matter.
15 Certainly the reasonable and sensible approach is to
16 defer to the bankruptcy court and to allow that court
17 to determine the scope of the stay when the issue is
18 raised in that court."

19 Q. Thank you. In your opinion, are the
20 claims against the debtors and non-debtors, the
21 debtors being VS Fox Ridge, Steve and Vicky
22 Christensen, are they intertwined with the claims
23 against the other parties in the counterclaim,
24 cross-claims and third-party complaints?

25 A. Absolutely.

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1 Q. How?

2 A. They're intertwined because, again, Forge
3 is seeking claims against all of the debtors,
4 codebtors and then the debtors here. When it said
5 codebtors, the debtors in the foreclosure actions.
6 They're uniquely intertwined between their
7 connections between the defendants, the debtors, and
8 Forge. It's so mingled together that there's no way,
9 unless we -- there's access to all the debtors to
10 take depositions, to conduct discovery, that our
11 clients would ever be provided the due process
12 they're entitled if they can't have access to those
13 -- to all the parties.

14 Q. Can the TM companies fully and fairly
15 litigate their claims and defenses without having the
16 debtors as parties?

17 A. No.

18 MR. SHIELDS: That's all the questions.

19 MR. BOLEY: Your Honor, are we going to
20 break for lunch before we continue?

21 THE COURT: What would be your preference?

22 MR. BOLEY: It'd be my -- I think it'd be
23 the debtors' preference to break now.

24 THE COURT: All right. Mr. Shields, is
25 that okay with you?

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1 MR. SHIELDS: That's fine with me, Your
2 Honor.

3 THE COURT: All right. How much time do
4 you want to take?

5 MR. BOLEY: Forty-five to 60 minutes or --
6 as much longer as you want.

7 THE COURT: Well, I'd like us to finish
8 today. I think everybody would agree with that, if
9 we can.

10 MR. HARRINGTON: Your Honor, could I just
11 -- I mean, I have some other appointments this --

12 THE COURT: Have you got something else to
13 do?

14 MR. HARRINGTON: I actually do.

15 THE COURT: Yeah.

16 MR. HARRINGTON: I don't know how long
17 they would --

18 MR. SHIELDS: Maybe we can finish with
19 this witness and then take a lunch break.

20 THE COURT: Well, Mr. Scott, can I ask you
21 to come back at 1:00 and finish then?

22 THE WITNESS: Sure. Sure.

23 THE COURT: Okay. Let's do that. Thank
24 you.

25 THE BAILIFF: All arise.

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1 (Lunch break from 12:09 to 1:05 p.m.)

2 THE BAILIFF: All arise. The Court
3 resumes its session.

4 Please be seated.

5 THE COURT: All right. Mr. Berry, you had
6 this witness?

7 MR. BERRY: Yes, Your Honor, if that's
8 okay.

9 David Berry appearing on behalf of
10 debtors, the Christensens.

11

12 CROSS-EXAMINATION

13 BY MR. BERRY:

14 Q. Giving the Court a little bit of a
15 roadmap, I'm first going to address the Court's
16 question as to what is new in the proposed Judge
17 Taylor counterclaim, cross-claim, third-party
18 complaint that we saw it for the first time on
19 October 9th that you testified earlier you prepared.

20 A. That's correct.

21 Q. And so I would like to you -- and I
22 believe you testified that there were just a couple
23 of new causes of action in there against these
24 defendants.

25 A. The new cause of action, if I recall --

1 again, I haven't seen the other amended counterclaim
2 for a while, or the other counterclaim for a while.
3 The claims against the Christensens individually and
4 against McKay Christensen and the claims against U.S.
5 Bank. I believe there's probably six claims that
6 aren't -- again, I shouldn't say -- they're new
7 compared to what was in that. They're not new claims
8 that no one's ever heard of or seen before. Again,
9 what we did was when the debtors in this case said,
10 look, we've got litigation in all these various
11 places --

12 Q. So let's look at Exhibit B in front of
13 you.

14 A. Do you want me to finish?

15 Q. No. You've gone beyond my question.

16 A. I don't think I did, but...

17 Q. Let's look at Exhibit B.

18 A. B?

19 Q. B as in baker.

20 A. Okay.

21 Q. And this pleading has your name on it,
22 correct?

23 A. It does.

24 Q. And it's entitled what?

25 A. Motion for leave to file an amended

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1 answer, a counterclaim and third-party complaint and
2 for a corresponding amendment to the scheduling
3 order.

4 Q. And what's the date of this document?

5 A. May 24th.

6 Q. May 24th. Less than a month before the
7 bankruptcies in this case were filed. So who were
8 you seeking as counsel to file counterclaims and
9 third-party complaints against in Exhibit B on May
10 24th?

11 A. Forge and Mr. Freeman.

12 Q. Only Forge and Mr. Freeman.

13 A. That's correct.

14 Q. Not against any of the debtors in these
15 bankruptcy proceedings. None of them are named as
16 third-party or cross-claims.

17 A. They're not named because those claims
18 were already in front of Judge Toomey, that's
19 correct. They would have been duplicative claims in
20 different lawsuits, which could have had different
21 results. That's why we didn't put them in the
22 original.

23 Q. And that same answer is true if you look
24 at Exhibit A that indeed on May 24th, when you did
25 your motion to amend, you weren't suing any of the

1 debtors in this case, none of them, correct? Exhibit
2 A, Judge Laycock.

3 A. That's correct, yeah.

4 Q. And if we look at the complaints you have
5 attached as your proposed amended complaints to both
6 of those proceedings, attached as, I believe,
7 Exhibits A to Exhibit A and Exhibit A to Exhibit B,
8 you're not naming any causes of action against either
9 of these debtors, right?

10 A. Yeah. I think I've given my explanation
11 for that, yes.

12 Q. But when we look at Exhibit 6, every
13 single cause of action, every single cause of action
14 is pled against the Christensens, correct?

15 A. No. I don't believe that's correct.

16 Q. Well, let's turn to page 64 of Exhibit 6.

17 A. Okay.

18 Q. Prayer for relief. Why don't you read
19 those first five lines under prayer for relief.

20 A. "Wherefore the TM parties pray," right
21 there? Is that correct?

22 Q. Yes.

23 A. "And request that the Court enter judgment
24 against Atlas Development, Forge Investments, the
25 Christensen parties, Mr. Freeman and U.S. Bank as

1 follows: On all causes of action for actual and
2 consequential damages to the TM parties" --

3 Q. That includes the Christensens, does it
4 not?

5 A. Yeah. And all --

6 Q. Every single cause of action --

7 THE COURT: Mr. Berry.

8 THE WITNESS: Wow.

9 THE COURT: Mr. Berry, back away from the
10 podium.

11 MR. BERRY: Yes, Your Honor.

12 THE COURT: Okay. Are you looking at me?

13 MR. BERRY: Yes, Your Honor.

14 THE COURT: Okay. That will not be
15 tolerated.

16 MR. BERRY: Yes, Your Honor.

17 May I approach the podium again?

18 THE COURT: Yes.

19 Q. (By Mr. Berry) So indeed the only honest
20 answer before this Court is that every cause of
21 action, every single cause of action in your proposed
22 amended pleadings that you've put together or we
23 first saw on October the 9th, every single cause of
24 action is new?

25 A. No.

1 Q. In the Taylor case, every single cause of
2 action is new. Had they ever been pled before in the
3 Taylor case?

4 A. All the claims against Forge and
5 Mr. Freeman had been pledged. When you look at that
6 and you say all causes of action --

7 Q. My question --

8 A. If you look in the causes of action -- no,
9 you asked me a question. Now I'm going to answer it.
10 If you look at the causes of action, every one of
11 them identifies who the cause is against. So when
12 you look at claims 10 and 11, for example, that are
13 against U.S. Bank only, those aren't against the
14 Christensens.

15 Q. All right.

16 A. So when it says all causes of action, all
17 the cause of actions have named who the causes are
18 against, sir.

19 Q. Indeed there were no causes of action
20 previously pled or have ever been pled in the Taylor
21 or Laycock cause of actions, ever against either of
22 these debtors, still hasn't been pled yet today,
23 other than this proposed pleading; is that correct?

24 A. That's correct. Yeah. I've answered that
25 several times.

1 Q. Let's go to Exhibit F. I'm now in my
2 roadmap going to your discussion on direct that
3 Mr. Christensen refused to testify after the filing
4 of the bankruptcy. And if we go to page 2 of
5 Exhibit F, at the first paragraph does it not say
6 that counsel, in this case Mr. Boley, is not
7 available to attend? It doesn't say that
8 Mr. Christensen will never attend, does it?

9 A. No. I didn't say that he never would
10 attend. I said that he was not presented the day for
11 the deposition. Mr. Boley informed us he couldn't be
12 there, he wasn't going to be there, and therefore
13 they're not going to produce him for the deposition.
14 He did -- there was discussion about, look, we might
15 be able to take this later. We said, well, we've got
16 the discovery cutoff deadline. He said, you know, we
17 could probably go past that. But it's never gone
18 anywhere since then because of the bankruptcy. So,
19 yeah, I didn't mean to insinuate that he was never
20 going to be presented. But he was -- on the date
21 that we had him scheduled, we were told he would not
22 be presented for his deposition that date.

23 Q. In fact, the next paragraph provides for
24 some dates, correct?

25 A. That's correct.

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1 Q. And if we go to Exhibit G, again going to
2 availability of, in this case, Mr. McKay Christensen.
3 Does it not say that he would be willing and prepared
4 to go forward?

5 A. Yes. I believe that's what I said this
6 morning. But the context there is the important
7 thing. He was not willing to show up on the date of
8 his deposition and testify regarding Forge or the
9 thing -- or bring the documents that we had asked him
10 to bring. Therefore, that's why that deposition --
11 we made the decision not to go forward that day. And
12 just said that we would discuss further in the future
13 if we could get together and do that.

14 Q. Not a refusal, just a rescheduling
15 request. All right.

16 Going back to Exhibit 6. So I'm trying to
17 understand what's -- isn't it true that in essence
18 you took every single allegation in the Toomey case
19 and you're attempting to move it over and litigate it
20 in two forums in front of Judge Taylor as against the
21 Christensens?

22 A. What do you mean in two forums? I'm not
23 sure.

24 Q. Well, there's a pending action in front of
25 Judge Toomey, correct?

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1 A. Correct.

2 Q. And basically you just incorporated all of
3 those causes of action into the Taylor action by your
4 proposed documents?

5 A. Yeah. All of those causes of action are
6 just as applicable in the Taylor litigation as they
7 are the Toomey litigation. We've only sought -- my
8 understanding is that the relief from the stay that's
9 been sought in the Toomey litigation is just to have
10 the protective order amended so those documents -- we
11 could have access to.

12 Q. And then you added additional causes of
13 action.

14 A. They're the same cause of action that I
15 believe were in the Toomey case; now in the Taylor
16 case.

17 Q. There's no conspiracy cause of action in
18 the Toomey case.

19 A. That could be -- that's possible.

20 Q. There's no RICO causes of action in the
21 Toomey case?

22 A. I believe there's amended counterclaim in
23 the Toomey case.

24 Q. So in essence, we would -- not only have
25 you added new causes of action that never existed

1 previously, you never even requested prior to the
2 filing of the cases. But now you're trying to have
3 litigation in two forums at the same time, same
4 causes of action?

5 A. No. There won't be any continuation of
6 the causes of action in the Toomey case. Those will
7 be stayed based on --

8 Q. So you'll dismiss those in the Toomey
9 action? Those will be dismissed leaving only the
10 remaining cause of action involving the third
11 parties, so to speak, directly?

12 A. Well, it's not up to me to dismiss those
13 claims in the Toomey action. But my understanding is
14 to get everything in front of one judge and one
15 forum. That was the point of doing this --

16 Q. That would require --

17 A. -- Exhibit Number 6.

18 Q. That would require a dismissal in the
19 Toomey action, correct?

20 A. That could be possible.

21 Q. Well, it either is or it isn't. If not,
22 then you're pending in two different courts, right?

23 A. I guess that's correct.

24 Q. And you're asking this Court to let you
25 have pending actions, some duplicative, in two courts

1 at the same time?

2 A. They would all be in one action. They
3 would not be proceeding in the other action.

4 Q. But you're not willing here today to say
5 that you're going to dismiss all of the causes of
6 action in Toomey?

7 A. It's not my case, sir. I don't -- that's
8 not my call.

9 Q. You're not aware of anyone saying they're
10 going to dismiss the causes of action in the Toomey
11 case?

12 A. I'm not -- yeah, I'm not sure. I don't
13 know that they would dismiss them or not. They may
14 dismiss them without prejudice to bring them. I
15 don't -- you'd have to ask Mr. Manning that question.

16 MR. BERRY: May I have one moment with
17 co-counsel, Your Honor?

18 THE COURT: Yes.

19 Q. (By Mr. Berry) I'm going to ask you to
20 look at Exhibit I, please.

21 A. Okay.

22 THE COURT: Mr. Berry, I'm sorry but
23 you've been referring to a number of exhibits that
24 you haven't offered. So it'll be up to you to figure
25 out what you've done here. For example, I right now

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1 has been received. But I think you've referred to
2 Exhibit F, which was Mr. Boley's e-mail to
3 Mr. Scott's partner, but that wasn't offered.

4 MR. BERRY: I would move the Court for
5 Exhibits F and G to be entered.

6 THE COURT: G's already been received.
7 Any objection to Exhibit F, Mr. Shields?

8 MR. SHIELDS: No, Your Honor.

9 THE COURT: All right. Exhibit F is
10 received.

11 (EXHIBIT F IS RECEIVED.)

12 MR. BERRY: I believe Exhibit 6 was
13 previously received by the Court, Your Honor.

14 THE COURT: It was. And then you also
15 referred back to Exhibits A and B. Did you want
16 those received?

17 MR. BERRY: Yes, please, Your Honor. I
18 would move for Exhibits A and B to be entered into
19 evidence.

20 THE COURT: Mr. Shields?

21 MR. SHIELDS: No objection, Your Honor.

22 THE COURT: All right. Exhibits A and B
23 are received.

24 (EXHIBITS A AND B ARE RECEIVED.)

25 THE COURT: All right. Sorry to interrupt

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1 you. Go ahead.

2 MR. BERRY: No. Thank you for that
3 housekeeping matter, Your Honor.

4 Q. (By Mr. Berry) So Exhibit I, you prepared
5 that? Your name's on it at least.

6 A. That's correct.

7 Q. And this is a notice of bankruptcy you
8 filed on behalf of your clients in the Judge Taylor
9 case?

10 A. That's correct.

11 Q. And this document was filed July 2nd?

12 A. Yes.

13 Q. And that actually predates the filing of
14 the notice of bankruptcy by either of these debtors
15 in that case, correct?

16 A. I'm not sure.

17 Q. If we look at exhibit --

18 One moment, Your Honor.

19 THE COURT: Yeah. In the Toomey matter,
20 Exhibit 3, which has been received, was -- looks like
21 it was filed on or about July 2nd.

22 MR. BERRY: And in the Taylor action, Your
23 Honor, I believe that's Exhibit Number 12, which is
24 the docket sheet. Entry dated July 11th.

25 THE COURT: Well, I'm looking at

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1 Exhibit 5, Mr. Berry, which is your notice of
2 bankruptcy, which is dated July 11th.

3 MR. BERRY: Yes, Your Honor.

4 THE COURT: Okay.

5 MR. BERRY: I would move for entrance of
6 Exhibit Number 5, but I think that's already been
7 accepted by the Court.

8 THE COURT: Exhibit 5 has already been
9 received, yes.

10 Q. (By Mr. Berry) So on page 4 of Exhibit I,
11 the first line under Statement of Facts, does it not
12 say defendants' position -- it's the defendants'
13 position, I guess. Defendants' position that this
14 lawsuit is stayed?

15 A. Where are you again? I'm sorry.

16 Q. The first line under Statement of Facts.
17 The first -- beginning of the first sentence.

18 A. Yeah. I mean, stayed based on those facts
19 and the plain language is the notices that we'd
20 received from both you and Mr. Boley.

21 Q. And on page 9, again in bold print as a
22 heading, "Lawsuit is stayed by the Christensen
23 defendants pending Chapter 11 bankruptcy." Correct?

24 A. That's what it says, yes.

25 Q. I'm curious, when we get down to the next

1 paragraph on page 9, "In addition, based on the
2 Christensen defendants bankruptcy, S. Christensen," I
3 assume you mean Steve Christensen?

4 A. Yeah. I believe he's defined earlier.

5 Q. "Refused to appear at a deposition in this
6 case."

7 A. Yeah.

8 Q. He refused?

9 A. He refused to appear at the deposition we
10 had set.

11 Q. Didn't we just read that Mr. Boley was
12 arranging for -- it was a scheduling issue of
13 counsel, it wasn't a refusal?

14 A. We can go back to that e-mail. I can show
15 you right where Mr. Boley said he won't be attending
16 based on either the stay and/or his unavailability.

17 THE COURT: Mr. Berry, I've read the
18 e-mail as well. You don't need to go through that
19 again.

20 MR. BERRY: All right. I tender the
21 witness, Your Honor.

22 THE COURT: Mr. Shields, anything further?

23 MR. SHIELDS: No further questions, Your
24 Honor.

25 THE COURT: All right. Thank you,

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1 Mr. Scott. You're excused.

2 MR. SHIELDS: Your Honor, could I just
3 verify that all our exhibits have been admitted, 1
4 through 14. I think they have.

5 THE COURT: Yes. Except for the exhibits
6 attached to 6.

7 MR. SHIELDS: Okay. And we didn't have
8 any -- I think that was a request by debtors'
9 counsel. Yeah, we --

10 THE COURT: That was the extent of their
11 stipulation and you didn't offer it --

12 MR. SHIELDS: Okay. I'll offer it --

13 THE COURT: You didn't argue anything else
14 so.

15 MR. SHIELDS: Okay. With all those
16 exhibits in then we rest, Your Honor.

17 MR. BOLEY: Your Honor, before the debtor
18 begins offering evidence, would the Court entertain a
19 motion for judgment as a matter of law?

20 THE COURT: I'm going to deny it. But if
21 you want to argue it for the record, go ahead.

22 MR. BOLEY: I'll just proceed then.

23 THE COURT: Yeah. I mean, it's your
24 burden.

25 MR. BOLEY: It's the debtors' burden?

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1 THE COURT: Of course it is. That's what
2 the statute says. I mean, do you want me to quote it
3 to you?

4 MR. BOLEY: Sure.

5 THE COURT: 362(g), and I'm pulling that
6 out of my back pocket, but if I'm wrong please
7 correct me. "The party requesting such relief has
8 the burden of proof on the issue of the debtors'
9 equity and property," that's not an issue here. "And
10 the party opposing such relief has the burden of
11 proof on all other issues."

12 The only thing Mr. Shields has to prove
13 when he comes in here on a motion for relief for
14 cause is that his client was participating in
15 litigation with the debtors pre-petition and that
16 litigation was stayed by the filing of the petition.
17 Everything else he's provided is in support of his
18 motion. The burden is completely on the debtors to
19 prove to the Court that they're entitled to
20 maintenance of the injunction.

21 MR. BOLEY: Understood, Your Honor.

22 THE COURT: All right.

23 MR. BOLEY: The debtor will prove that
24 cause does not exist. The debtor calls Stephen
25 Christensen to the stand.